79-1236

Supreme Court, U.S.
FILED
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No.

In the

Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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APPENDIX

IN THE SUPREME COURT OF IOWA

KALO BRICK AND TILE COMPANY,
Plaintiff-Appellant-Resister,

vs.

CHICAGO NORTHWESTERN TRANSPORTATION COMPANY,
Defendant-Appellee-Applicant.

No. 2-60942
Filed Nov 30 1979

ORDER

After consideration by the court en banc defendant-appellee's application for further review is hereby overruled and denied.

Done this 30th day of November, 1979.

The Supreme Court of Iowa
By /s/ W. W. Reynoldson
W. W. Reynoldson, Chief Justice

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IN THE COURT OF APPEALS OF IOWA

KALO BRICK & TILE COMPANY,

Plaintiff-Appellant,

vs.

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY and JACK CHMELER,

Defendants-Appellees.

Filed October 18, 1979

Appeal from Webster District Court - Russell J. Hill, Judge.

Plaintiff appeals judgment for defendant in tort action based on failure to provide adequate railroad service. Reversed and Remanded.

M. Gene Blackburn & John H. Mitchell of Murray & Blackburn, P.C., of Fort Dodge, for plaintiff-appellant.

Bruce E. Johnson of Gamble, Riepe, Burt, Webster & Davis, of Des Moines, for defendants-appellees.

Heard by Oxberger, C.J., Donielson, Shell and Johnson, JJ. Carter, J., takes no part.

DONIELSON, J.

Plaintiff, Kalo Brick and Tile Company, appeals judgment for defendant, Chicago and Northwestern Transportation Company, in a tort action based on alleged failure to provide adequate rail service. For reversal, plaintiff asserts the action was not within the exclusive or primary jurisdiction of the Interstate Commerce Commission (ICC), ICC orders in the abandonment proceeding are not preclusive of issues presented in the trial court, and a remand order of the federal district court precludes the defendant from challenging the jurisdiction of the trial court. We reverse and remand for a new trial.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

In April 1973 defendant-railroad discontinued service on a branch line serving plaintiff's plant after numerous interruptions of service due to earth slides. Plaintiff notified its customers, shortly thereafter, it was going out of business due to its inability to ship by rail. It is undisputed the railroad had not yet made a decision to abandon permanently the branch line. In November 1973, subsequent to plaintiff going out of business, defendant applied to the ICC for permission to abandon the branch line. An ICC order, entered April 30, 1976, directed the issuance of a certificate of abandonment and forbid any abandonment prior to the effective date of the certificate. The April 30 ICC order found plaintiff to be a protestant in default, but a further inquiry by plaintiff's counsel was treated as a petition for reconsideration. In September 1976 the ICC entered an order denying the petition for reconsideration and setting the effective date of the abandonment at 20 days from the date of the service of the order.

Plaintiff brought this action in September 1974. In July 1977 the trial court entered judgment for the defendant, making findings of fact concerning the earth slides and the ICC proceedings. The trial court concluded that the question in the case was the reasonableness of the railroad's abandonment of direct rail service to plaintiff's plant; a question held to be within the jurisdiction of the ICC, not the state court. Further, the defendants were not found to be precluded from challenging the Iowa court's jurisdiction by the federal court's remand order because that order was based on lack of diversity jurisdiction, not the merits of the jurisdictional issue. Finally, the trial court concluded that the ICC's factual determination of the reasonableness of the railroad's abandonment collaterally estopped plaintiff from relitigating that issue. Judgment was entered dismissing the petition.

II.

Plaintiff has moved to strike divisions IV, V, VI, and IX of defendant's brief, asserting those divisions raise issues not assigned as error in its brief and argument or raised by defendant in a cross-appeal. It is plaintiff's contention that defendant is asking in these divisions this court for relief not granted by the trial court. A party that neither appeals nor cross-appeals can have no greater relief or redress on appeal than accorded it by the trial court. *See Bartels* v. *Hennessey Brothers, Inc.,* 164 N.W. 2d 87, 92 (Iowa 1969). *See also In re Marriage of Novak,* 220 N.W.2d 592, 598 (Iowa 1974); *Randolph Foods, Inc.* v. *McLaughlin,* 253 Iowa 1258, 1277, 115 N.W.2d 868, 879 (1962); *Schlotfelt* v. *Vinton Farmers' Supply Co.,* 252 Iowa 1102, 1115, 109 N.W.2d 695, 702 (1961). Accordingly, we hold defendant is entitled, if at all, only to the relief accorded by the trial court—dismissal of the action due to absence of jurisdiction. We grant plaintiff's motion to strike divisions IV, V, VI, and IX of defendant's brief.

III.

The starting point of our analysis is whether defendant is precluded from raising the issue of the trial court's jurisdiction following the remand by the federal district court. Defendant removed the case to federal district court by petition for removal. Plaintiff filed a motion to remand and a motion to dismiss was then filed by defendant. The motion to dismiss alleged the federal district court lacked subject matter jurisdiction of the action.

The federal district court remanded the case on jurisdictional grounds because of the absence of diversity of citizenship. This ruling did not decide, however, the state court had jurisdiction but merely that the federal court could not hear the case. Since this issue is separate from the one on appeal, the federal court's ruling is not res judicata and defendant is not precluded from raising the issue of the state court's jurisdiction to hear this

case. *Mauer* v. *Rohde,* 257 N.W.2d 489, 497 (Iowa 1977) (quoting *Schneberger* v. *United States Fidelity & Guaranty Co.,* 213 N.W.2d 913, 917 (Iowa 1973)). We move to that issue.

IV.

The central and controlling issue in this case is whether the trial court possessed jurisdiction to hear plaintiff's claims, concerning violations of sections 479.3 and 479.122, The Code 1973, involving a railroad's duty to furnish cars, and tortious interference with plaintiff's business. In resolving this issue, we must first determine whether the Interstate Commerce Act preempts these statutes and the common law on which plaintiff relies for relief. If we conclude the state court has concurrent jurisdiction, we must then decide whether the doctrine of primary jurisdiction is applicable to this case such that the issues presented are exclusively within the jurisdiction of the ICC. After reviewing the arguments and cases cited by the parties, we conclude the Interstate Commerce Act does not preempt state statutory or common law and the doctrine of primary jurisdiction is not applicable to this case.

The Iowa Legislature has imposed on the railroads the unqualified and unconditional duty to furnish car service and transportation to all persons who apply. §§ 479.3, .122. Defendant argues this statutory duty has been preempted by the Interstate Commerce Act, 49 U.S.C. §§1, 8, 9 (1976) (current versions in relevant part at 49 U.S.C.A. §§ 10501, 11705 (Supp. 1979)), which rendered invalid state statutes and common law to the extent they purport to regulate railroad car service in interstate commerce. We do not agree the Interstate Commerce Act preempted the particular sections relied on by plaintiff, but view them as complimentary, alternative means of relief for injured parties.

We find support for our position in cases of the United States Supreme Court and the Iowa Supreme

Court. In *Pennsylvania Railroad Coal Mining Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 35 S. Ct. 484, 59 L. Ed. 867 (1915), the Supreme Court, interpreting the various sections of the Interstate Commerce Act, held that state and federal courts have concurrent jurisdiction, without a preliminary finding by the ICC, of a suit brought by a shipper under state common law against an interstate carrier to recover damages arising out of the latter's duty to furnish cars needed by the shipper. *Id.* at 132; 35 S.Ct. at 488; 59 L.Ed. at 873; *Eastern Railroad* v. *Littlefield*, 237 U.S. 140, 143, 35 S.Ct. 489, 490, 59 L. Ed. 878, 882 (1915). Focusing on section 22 of the Act, the Court found all remedies existing under state common law are preserved unless they are inconsistent with or interfere with remedies contained in the Act. *Puritan*, 237 U.S. at 132; 35 S.Ct. at 488; 59 L. Ed. at 872-73. The Court discussed the effect of section 22[1] in the following language:

---

[1] The Interstate Commerce Act was revised without substantive change in 1978. Act of Oct. 17, 1978, Pub. L. 95-473, §1, 92 Stat. 1337. Section 22 was repealed except as it vested in the ICC functions related to the transportation of oil. Act of Oct. 17, 1978, Pub. L. 95-473, §4(b), (c), 92 Stat. 1466-1470. The revised Interstate Commerce Act, however, contains the following language that substantially retains the effect of sections 22 and 1(17(a) of the old Act.

> This subtitle [outlining the general jurisdiction of the ICC] does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

49 U.S.C.A. § 10501(c) (Supp. 1979). This organizational revision of the Act does not affect our analysis or holding. Act of Oct. 17, 1978, Pub. L. 95-473, §3, 92 Stat. 1466.

> That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common-law duties and the like. But for this proviso to §22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts, and this clause was added to indicate that the commerce act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction.

Id. See also Pennsylvania Railroad v. *Sonman Shaft Coal Co.*, 242 U.S. 120, 123-25, 37 S.Ct. 46, 47-48, 61 L. Ed. 188, 191 (1916). The *Puritan* analysis was subsequently applied in *Illinois Central Railroad* v. *Mulberry Hill Coal Co.*, 238 U.S. 275, 35 S.Ct. 760, 59 L. Ed. 1306 (1915), to allow recovery under a state statute for a carrier's failure to furnish cars. *Id.* at 281-83, 35 S.Ct. at 763-64, 59 L. Ed. at 1309-10.

In accordance with *Puritan*, the Iowa Supreme Court in *Baird Brothers* v. *Minneapolis & St. Louis Railroad*, 181 Iowa 1104, 169 N.W. 412 (1917), held that in suits brought for the enforcement of rights concerning interstate commerce but not for specific performance of provisions of the Interstate Commerce Act, an Iowa district court has concurrent jurisdiction with federal courts. *Id.* at 1122, 169 N.W. at 418. The remedy sought to be enforced, the court concluded, did not conflict with the

Interstate Commerce Act and no burden was placed on interstate commerce. *Id.* It is clear, then, that remedies existing under state statute or state common law are preserved unless they are inconsistent with or interfere with remedies contained in the Interstate Commerce Act. *Baird,* 181 Iowa at 1117; 165 N.W. at 416. *See State Public Utilities Commission* v. *Baltimore & Ohio Southwestern Railroad,* 281 Ill. 405, 412-13, 118 N.E. 81, 84 (1917). As the supreme court in *Baird* stated:

> There is nothing in the [Interstate Commerce Act] the enforcement of which would interfere with or abridge the rights of the shipper in demanding his right to reasonable shipping facilities, such as are in controversy here and to recover damages. A shipper's demanding of the defendant reasonable shipping facilities does not abridge or interfere with, nor is it inconsistent with, the provisions of the Commerce Act.

Baird, 181 Iowa at 1117, 165 N.W. at 416.

An analogous case decided by the Iowa Supreme Court is *Chicago, Rock Island & Pacific Railroad* v. *Linwood Stone Products Co.,* 258 Iowa 1378, 138 N.W.2d 902 (1965). In that case, the supreme court held the Iowa district court had concurrent jurisdiction with the federal court to decide a question involving a counterclaim, based on the railroad's alleged failure to furnish clean cars, in an action by the railroad to recover demurrage on cars. *Id.* at 1382; 138 N.W.2d at 905. The underlying rationale of these cases is that as long as the state statute or common law is not inconsistent with federal law and does not attempt to regulate interstate commerce, state and federal courts have concurrent jurisdiction.

Defendant seeks to distinguish *Puritan* and *Baird Brothers* by pointing out they were decided without a consideration of the effect of the Hepburn Act and contends the case of *Chicago, Rock Island & Pacific Railway* v. *Hardwick Farmers Elevator Co.,* 226 U.S. 426, 33 S.Ct.

174, 57 L. Ed. 284 (1913), determined the effect of that act on the power of states to regulate car service in interstate commerce. Not only is *Hardwick* inapposite because of its facts, but there is direct authority contrary to such contention.

Specifically, in *Pennsylvania Railroad* v. *Sonman Shaft Coal Co.*, 242 U.S. 120, 3 S.Ct. 46, 61 L.Ed. 188 (1916), the Supreme Court held that an action for failure to furnish sufficient cars "may be enforced in either a federal or state court without any preliminary finding by the Commission, and this whether the carriers' default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act . . . ." *Id.* at 124, 37 S.Ct. at 48, 61 L. Ed. at 191. Moreover, the Supreme Court in *Illinois Central Railroad* stated:

> It is true that the *Puritan Case* arose before the passage of the Hepburn Act of 1906; but there is nothing in the amendments introduced by that Act to affect the jurisdiction of the state court in an action as the present.

238 U.S. at 283, 35 S.Ct. at 763, 59 L. Ed. at 1310.

Lastly, in a case concerning jurisdiction of actions involving the failure to furnish cars, the Illinois Supreme Court stated:

> The law as settled by the Supreme Court of the United States,—the final authority on the question,—is, that a State statute requiring an inter-State carrier to furnish cars at points within the State within a reasonable time is in entire harmony with the Hepburn amendment of the Inter-State Commerce act, and the State and Federal courts have concurrent jurisdiction of actions for a failure to perform the duty . . . .

State Public Utilities Commission v. *Baltimore & Ohio Southwestern Railroad,* 281 Ill. 405, 413, 118 N.E. 81, 84

(1917). These cases unequivocally support the view adopted here that there is no preemption of state law, even after consideration of the Hepburn Amendment.

We find the other cases cited by defendant unpersuasive as they do not address precisely the issue of this case. This is not a question of a regulatory state state law in conflict with a federal law. If that were the case, it could not be gainsaid that federal law is supreme, rendering state law void. Rather, this state law is remedial only and exerts no burden on interstate commerce, nor does it interfere with regulatory powers and duties of the ICC. This same line of reasoning is equally applicable to the tortious interference claim as it is a remedy provided by Iowa common law. Statutory and common law grounds relied on by plaintiff's relief are not preempted by the Interstate Commerce Act.

V.

The rationale supporting our holding that the state court has concurrent jurisdiction with the federal court to hear this case leads us also to conclude the doctrine of primary jurisdiction is inapplicable to this case and there need be no deferral to the ICC. Plaintiff has asserted primarily three grounds for relief: The railroad's violation of statutory duty to furnish cars under section 479.3; the railroad's negligent maintenance of tracks and roadbeds; and tortious inference with conduct of plaintiff's business. Analysis of these questions does not require any administrative expertise; thus deferral to ICC is unnecessary.

The principles underlying the doctrine of primary jurisdiction are set forth in *Far East Conference* v. *United States*, 342 U.S. 370, 72 S.Ct. 492, 96 L. Ed. 576 (1952):

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should

> not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciaries are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Id., 342 U.S. at 745-52, 72 S.Ct. at 494, 96 L. Ed. at 582 (1952).

We find the grounds asserted for relief raise issues of fact coming within the conventional experience of judges and do not require exercise of administrative discretion. *Linwood Stone Products,* 258 Iowa at 1389-90; 138 N.W.2d at 908; *see Johnson* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad,* 400 F.2d 968, 972 (9th Cir. 1968). Regarding defendant's failure to furnish car service as a violation of section 479.3, we discern no need for the unique administrative expertise of the ICC to decide whether car service was not provided or the railroad was negligent in its track maintenance. *Linwood Stone Products,* 258 Iowa at 1389-90, 138 N.W.2d at 908. This argument is even stronger when applied to the common law tortious interference claim. *Id.* Nor is there any problem with uniformity, another interest protected by the primary jurisdiction doctrine. This is not a determination of what reasonable service was due plaintiff, but whether reasonable service, as determined by the ICC, was provided. The Iowa district court is in as good a position to adequatedly decide this as the ICC.

VI.

Our decision in this case to reverse the trial court's decision and remand for a new trial makes it unnecessary to reach plaintiff's other issue concerning whether an unlawful abandonment occurred.

REVERSED AND REMANDED.

IN THE

DISTRICT COURT OF THE STATE OF IOWA

IN AND FOR WEBSTER COUNTY

Law No. 45664

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY, and JACK CHEMLER,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, and JUDGMENT

BE IT REMEMBERED that on the 19th day of October, 1976, the within cause came on for trial to the Court, the parties appearing by their attorneys of record. Said trial concluded on the 26th day of October, 1976, and the within matter was submitted to the Court on or about the 23rd day of February, 1977. The Court having heard the proofs of the parties, having read and considered the briefs and arguments of counsel, and being fully advised in the premises, FINDS the facts as follows:

FINDINGS OF FACT

Plaintiff Kalo Brick & Tile Company, hereafter "Kalo," is an Iowa corporation with its principal place of business at Fort Dodge, Webster County, Iowa.

Defendant Chicago & North Western Transportation Company, hereafter "Railroad," is a common carrier by railroad engaged in the interstate transportation of freight for hire and at all times material herein operated a railroad in Webster County, Iowa.

Defendant Jack Chmeler, mistakenly named "Scemeler," was employed by the Defendant railroad as a freight agent in Fort Dodge, Iowa, from July 17, 1972 through December 15, 1974. Mr. Chmeler was a resident of the State of Iowa.

Prior to April, 1973, Plaintiff was engaged in the manufacture of clay products near Kalo, Webster County, Iowa. Plaintiff's raw materials and manufacturing facilities were located near the Des Moines River and near a track owned and operated by the Defendant Railroad.

Plaintiff had been in operation for in excess of fifty years and in April, 1973, manufactured simulated antique brick which was sold and distributed through nine midwestern states. Plaintiff had relied upon the Defendant Railroad, and its predecessors in interest, as its primary and principal source of transportation for the transportation of its products in interstate commerce; Kalo having relied upon truck transportation for intrastate transportation.

Defendant Railroad commenced servicing Kalo in approximately the fall of 1960 when Defendant Railroad acquired the assets of the Minneapolis & St. Louis Railroad, shown in orange on Exhibit "A" attached hereto and made a part hereof for illustrative purposes only. This portion of the old Minneapolis & St. Louis Railroad extended from Fort Dodge, Iowa to Kalo, Iowa for a distance of approximately 5.6 miles. Said line terminated at Plaintiff's plant in Kalo, Iowa. The Minneapolis & St. Louis Railroad was constructed on the side hills of the Des Moines River. As this line left Fort Dodge in a southerly direction it generally followed the northeast bank of the Des Moines River, intersected the Fort

Dodge, Des Moines & Southern Railway at the Shady Oak transfer, bridged the Des Moines River, and followed the west bank of said river in a southerly direction at Kalo.

The Fort Dodge, Des Moines & Southern Railway, shown in green on Exhibit "A", travels in a southerly direction from the City of Fort Dodge and was constructed on a side hill of Gypsum Creek as it approached the Des Moines River and the tracks of the Defendant Railroad.

The general area may be described as rugged terrain, but the hills in the area are not high. Quarries and clay pits are located on the high ground between the aforesaid railroads and north of the Des Moines River. Materials have been removed from these quarries and clay pits for many years which result in ponded water. In addition, waste materials from the mined areas constituted an overburden in this same area. The soil contains clay which is hard and stable when dry but moves and becomes unstable when moist.

In 1961 earth slides occurred to the north and west of the Shady Oak Transfer which damaged the tracks of the Defendant Railroad in several areas and this portion of the tracks had to be taken out of service. Repairs were effected and service reinstated over these tracks.

In the spring of 1966 slides again occurred in this same area and service over these tracks was terminated for approximately six to seven months for repairs to be completed. Repairs were effected and the line again placed back in service.

In March, 1967, slides again occurred in the same general area and the repairs effected in 1966 failed to hold and the railroad embankment disappeared in places into the Des Moines River. Service over this line was never again reinstated.

In 1967 the Defendant Railroad leased at least a portion of the Fort Dodge, Des Moines & Southern Railway

and service was made to Kalo over the leased track to the Shady Oak Transfer and then on track belonging to the Defendant Railroad to Kalo. Defendant Railroad had an obligation to maintain the track of the Fort Dodge, Des Moines & Southern Railway north of the Shady Oak Transfer.

In March, 1973, officers of Kalo observed ponded water to the west of the Shady Oak Transfer, and near the red "X" on Exhibit "A", and adjacent to the railroad embankment leased by the Defendant Railroad. Kalo attempted to pump water over the roadbed in an attempt to clear the culvert draining the damned up body of water. Officers of Kalo had found the outfall end of said culvert and were looking for the intake. They were unsuccessful and abandoned the project.

During the first few days of April, 1973, slides occurred on the line leased from the Fort Dodge, Des Moines & Southern Railway and north of the intersection of said railway with the tracks of the Defendant Railroad.

The slide at the Shady Oak Transfer, shown generally by the red "X" on Exhibit "A", occurred over a 150 foot area of the leased embankment. A slide also occurred north of this area which affected approximately 60 feet of track. Other sides were developing along this portion of the Fort Dodge, Des Moines & Southern Railway.

On the 4th day of April, 1973, Defendant Railroad notified Kalo that it could no longer provide cars at the Kalo plant and service to the Kalo plant was terminated at that time.

Defendant Railroad then provided cars to Kalo at Fort Dodge which required Kalo to transport its product to Fort Dodge by truck for delivery to Defendant Railroad. Kalo was required to bear the cost of said transportation to Fort Dodge.

On the 18th day of April, 1973, Kalo notified its customers that it was going out of business but would complete existing contracts.

Between the 4th day of April, 1973, and the 25th day of April, 1973, a decision was made that the Defendant Railroad could not maintain safe rail passage over the tracks leased from the Fort Dodge, Des Moines & Southern Railway and it was taken out of service by the roadmaster. Defendant Railroad concluded that it could not stabilize the alignment of the tracks but no decision was made at that time as to whether Defendant Railroad would attempt to abandon service to Kalo.

In August, 1973, Kalo stopped production, sold its inventory, and disposed of its assets.

The washout at the northern junction of the Shady Oak Transfer was comparatively simple for the Defendant Railroad to repair. The reason this line was removed from service was because of the slides which were taking place along many points of the line and the above washout of the railroad embankment was a single factor in the decision to terminate service over the line. There has been a long history of slides on the Fort Dodge, Des Moines & Southern Railway because of the composition of the soil. The slopes are unstable and several of the slopes are moving. The tracks are built on an unstable area.

The tracks near the Shady Oak switch, after April 4, 1973, were out of place horizontally and vertically and showed results of failure of the railroad embankment. The ponded water near the embankment had been there sometime and was a factor in the displacement of the roadbed because (1) it weakened the soil because of saturation; (2) it created hydrostatic pressure; (3) forces induced by seepage water passed through the embankment; and (4) the embankment was on a steep slope descending to Gypsum Creek and gravity pulled the embankment toward the creek.

Permitting ponded water to stand near a railroad embankment is not good maintenance practice.

After the slides on or about the 4th day of April, 1973, no cars were received at the Kalo plant and all of Plaintiff's products had to be loaded at Fort Dodge.

On the 14th day of November, 1973, Defendant Railroad made an application to the Interstate Commerce Commission pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C.A., Section 1, Et. seq., for a certificate of public convenience and necessity authorizing the Defendant Railroad to abandon its line to Kalo. This proceeding pertained to the trackage belonging to the Defendant Railroad, formerly owned by the Minneapolis & St. Louis Railroad, and not the line owned by the Fort Dodge, Des Moines & Southern Railway and leased by the Defendant Railroad.

Kalo filed objections to the abandonment of the 5.6 miles of track in said proceeding. On the 30th day of April, 1976, the Interstate Commerce Commission Review Board Number 5 made a finding of fact "that the cessation of service occurred because of conditions over which applicant (Defendant Railroad) had no control, not because of wilful abandonment"; that continued operation of the line would be an unnecessary burden on said applicant and on interstate commerce; and said commission issued an order for appropriate certificate of abandonment. Upon Kalo's petition for reconsideration of said order, the Interstate Commerce Commission, Division 3, acting as an Appellate Division denied Kalo's petition for reconsideration on the 23rd day of September, 1976, and affirmed the order of the Commission Review Board Number 5.

During the winter of 1972-1973, Kalo experienced the energy crunch and was forced to curtail its operations during the winter months, which are a slack period in the brick industry. The brick industry, including Kalo, experiences labor problems because it is hard work and low paying.

During this same period of time, Defendant Railroad was also experiencing labor problems as it was short of help and could not train the employees fast enough.

CONCLUSIONS OF LAW

On the 13th day of September, 1974, Plaintiff filed its petition herein alleging generally that the Defendants failed to furnish cars and service to Plaintiff after April, 1973, with resulting damages to Plaintiff in the amount of $350,000.00.

On the 28th day of April, 1976, Plaintiff filed its Amendment to Petition herein, Division II thereof alleging negligence on the part of the Defendants in April, 1973, with resulting damages of $350,000.00 and punitive damages of $150,000.00.

Division III of said amendment alleges that the Defendants are guilty of tortious interference with contract rights because of Defendants conduct in April, 1973, with resulting damages to Plaintiff in the sum of $100,000.00.

STATUTE OF LIMITATIONS

The answers of the Defendants, as amended, allege that Divisions II and III of the petition, as amended, are barred by the limitations of actions in that the causes of action alleged therein were not commenced within two years of the accrual thereof, to-wit: April, 1973.

Section 614.1, The Code, provides in part as follows:

> "Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> 1. . . .
>
> 2. Injuries to person or reputation—relative rights—statute penalty. Those founded on injuries to the person or reputation, including injuries to rel-

ative rights, whether based on contract or tort, or for a statute penalty, within two years.

3. . . .

4. Unwritten contracts—injuries to property—fraud—other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsection 8. . . ."

Division II, founded on negligence, and Division III, founded on tortious interference with contract rights, allege that Plaintiff was forced to close its business because of the negligence and tortious interference with contract rights, respectively. Divisions II and III constitute allegations of injuries to property and are fundamentally proprietary in nature. Consequently, the five year statute of limitation of Section 614.1(4) is applicable rather than subparagraph two of said section (CLARK V. FIGGE (Iowa, 1970) 181 N.W. 2d 211, 58 A.L.R. 3d 1019).

The Court CONCLUDES that Divisions II and III were brought within the prescribed period of time.

CAR SERVICE

Plaintiff has characterized its case as a car service case, alleging that the Defendants failed to perform their common law and statutory duty to furnish Plaintiff with suitable cars. Defendant has challenged this characterization and contends that this case involves issues of an abandonment of a railroad line, which is exclusively within the domain of the Interstate Commerce Commission (hereafter I.C.C.), which has approved the abandonment. Defendant also contend that if this is a car service case, questions as to car service are also questions of the I.C.C. and not within the jurisdiction of a state court. Further,

Defendants contend that if there is a state court question, Defendants have fulfilled their obligations under Iowa law.

A railroad's common law duty to furnish cars to its customers has been superseded by statute both in Iowa (SEC. 479.3, 1975 Code of Iowa; SEC. 327D.3, 1977 Code of Iowa) and under federal law, The Interstate Commerce Act, as amended (49 U.S.C. Sec. 1(11)). The carrier is under an obligation to provide cars which are sufficient in number, type and condition to fulfill a shipper's needs unless it has a valid excuse (PENNSYLVANIA R.R. V. PURITAN COAL MINING CO. (1914) 237 U.S. 121, 35 S. Ct. 484, 59 L. Ed. 867; CHICAGO, R.I. & P. R.R. V. LINWOOD STONE PRODUCTS CO. (1965) 258 Iowa 1378, 138 N.W. 2d 902).

Defendant contends that the area of car service has been preempted by the Interstate Commerce Act and that a car service case must be brought before the I.C.C. rather than the courts. Plaintiff contends that the courts do have jurisdiction of car service cases in spite of 49 U.S.C.A. Sec. 1(11).

The correct rule as to the primary jurisdiction of the I.C.C. appears to be that under the Interstate Commerce Act, as amended, there has been a partial preemption of the car service area by the I.C.C. Thus, if the allegation against the railroad is that it has discriminated against a shipper by failing to furnish him cars in accord with established rules and practices of the railroad, the question of whether such rules or practices have in fact been followed is one which a court may determine. However, if the allegation is that the rule or practice itself is unreasonable and discriminates against the shipper, the question of the reasonableness of the rule or the practice thereof is for the I.C.C. to determine (BALTIMORE & OHIO R.R. V. BRADY (1933) 288 U.S. 448, 53 S. Ct. 441, 77 L. Ed. 888; MIDLAND VALLEY COAL CO. V. BARKLEY (1927) 276 U.S. 482, 48 S. Ct. 342, 72 L. Ed. 664; PENNSYLVANIA R.R. V. PURITAN

COAL MINING CO., Supra; ANDERSON V. CHICAGO, M. & ST. P. R.R. (Mich., 1919) 175 N.W. 246).

The failure of Defendant Railroad to continue service to Plaintiff's plant site does not of itself constitute a failure to provide car service. A shipper does not have an absolute right to service at his plant site. Although a shipper may in fact have such a right in a particular case, the right does not exist at common law and must arise by contract, statute, or custom (GREAT LAKES STEEL CORP. V. DETROIT, T. & I. R.R. (Mich, 1947) 26 N.W. 2d 704; Mc DONALD V. CHICAGO & N.W. R.R. (Wis., 1936) 266 N.W. 246; RICHEY AND GILBERT CO. V. NORTHERN PAC. R.R. (Minn., 1910) 125 N.W. 897).

The fact that Plaintiff's cost of shipping under the practice of shipping from the Fort Dodge facility was so high that it was forced out of business would go to the reasonableness of the practice, a question for the I.C.C. (MIDLAND VALLEY COAL CO. V. BARKLEY, Supra; TAYLOR COUNTY SAND & GRAVEL CO. V. SEABOARD C. L. R.R. (5th Cir. 1971) 446 F. 2d 853; ELGIN COAL CO. V. LOUISVILLE & N. R.R. (6th Cir. 1969) 411 F. 2d 1043; I.C.C. V. BALTIMORE & A. R.R. (D.C. Md. 1975) 398 F. Supp. 454).

The Court CONCLUDES that this is not a car service case, but to the extent that car service issues are raised, it involves issues which are within the jurisdiction of the I.C.C. rather than a court.

DUTY TO PROVIDE TRANSPORTATION

Closely related to a railroad's obligation to provide car service is its general obligation to transport all goods tendered to it. This duty to provide transportation, facilities and service is another common law obligation which has been made statutory (SEC. 479.3, 1975 Code of Iowa; SEC. 327 D.3, 1977 Code of Iowa).

At common law and under state statutes, there is a cause of action for failure to provide transportation service, whether by failure to provide car service or otherwise (PENNSYLVANIA R.R. V. PURITAN COAL CO., Supra; MINNEAPOLIS & ST. L. RY. V. PACIFIC, GAMBLE, ROBINSON CO. (8th Cir. 1954) 215 F. 2d 26; CHICAGO, R.I. & P. R.R. V. LINWOOD STONE PRODUCTS CO., Supra; BAIRD BROS. V. MINNEAPOLIS & ST. L. RY. (1916) 181 Iowa 1104, 165 N.W. 840; CARR V. CHICAGO, R.I. & P. R.R. (1916) 173 Iowa 444, 155 N.W. 840; ANDERSON V. CHICAGO, M. & ST. P. RR., Supra).

Kalo alleges that there was a general failure to provide transportation service and alleges that the railroad negligently allowed its track to become unuseable. Kalo contends that the result of the railroad's negligence in failing to keep up its track resulted in a failure to provide transportation service and cites the case of Johnson v. Chicago, M. St. P. & P. R.R. (9th Cir. 1968) 400 F. 2d 968 in support of the proposition that a railroad is liable in damages for a failure to maintain its track if such results in a failure to provide service to a shipper.

The *Johnson* case is distinguishable from the instant case in that the *Johnson* case did not involve an abandonment, as there was no intention on the part of the railroad to permanently discontinue service. Where an abandonment is involved, the rights of the parties are significantly different.

ABANDONMENT

A certificate of public convenience and necessity from the I.C.C. is required before a line may be abandoned (49 U.S.C.A. Sec. 1a(1) (1977), 49 U.S.C.A. Sec. 1(18) (1975) (Amended, Pub. L. 94-210, Tit. VIII, Secs. 802, 809(c), 90 Stat. 127, 146 (Feb. 5, 1976); Pub. L. 94-555, Tit. II, Sec. 218, 90 Stat. 2628 (Oct. 19, 1976). Failure to keep a railroad line in repair, with the result that it becomes unuseable, coupled with the cessation of service

on the line without the I.C.C. permission, constitutes an illegal abandonment of a line (I.C.C. V. MAINE C. R.R. (2nd Cir. 1974) 505 F. 2d 590; I.C.C. V. CHICAGO, R.I. & P. R.R. (8th Cir. 1974) 501 F. 2d 908, Cert. Den. 420 U.S. 972, 95 S. Ct. 1393, 43 L. Ed. 2d 652; I.C.C. V. CHICAGO & N.W. TRANSPORTATION CO. (D.C. Ia. 1975) 407 F. Supp. 827; I.C.C. V. BALTIMORE & A. R.R., Supra).

Generally, the remedies for an illegal abandonment are solely in federal court. A party may have a state court remedy if a state statute provides one or if the party has a contract with the railroad obligating the railroad to keep the track in service (MONTGOMERY V. ATCHISON, T. & S.F. R.R. (10th Cir. 1937) 89 F. 2d 94; But see MOELLER V. I.C.C. (D.C. Ia. 1962) 201 F. Supp. 583).

There are no Iowa statutes providing a remedy for an illegal abandonment.

Absent statutory authority, however, there is no common law right to prevent abandonment of a railroad line, or to sue for damages as a result thereof (SCULLY V. CENTRAL NEBRASKA PUBLIC POWER & IRRIGATION DISTRICT (Neb. 1943) 9 N.W. 2d 207, 215; WOODRUFF V. U.S. (D.C. D.C. 1941) 40 F. Supp. 949; BROWNWOOD N. & S. RY. V. RAILROAD COMMISSION OF TEXAS (D.C. Tex. 1926) 16 F. 2d 297, 298).

The remedies under federal law are:

(1) The right to enjoin the abandonment. Until 1976, this could be done by "any court of competent jurisdiction," (49 U.S.C.A. Sec. (20) (1975)), which would apparently include state courts. After 1976, the injunctive remedy is solely in a federal court (49 U.S.C.A. Sec. 1a (9) (1977)); and

(2) Damages to the shipper for the period of time from the date of the unlawful abandonment until the abandonment is approved by the I.C.C. (49 U.S.C.A. Secs.

8, 9 (1977); I.C.C. V. CHICAGO, R.I. & P. R.R., Supra; JOHNSON V. CHICAGO, M. ST. P. & P. R.R., Supra; But see ASBURY V. CHESAPEAKE & O. R.R. (D.C. D.C. 1970) 314 F. Supp. 310).

In pursuing the damages remedy, a shipper may proceed either before the I.C.C. or before a federal court, but not both, and not in a state court (49 U.S.C.A. Secs. 8, 9).

In determining whether the railroad has fulfilled its obligation to provide adequate facilities, the test is one of reasonable diligence; and its business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should in this respect be considered (MIDLAND VALLEY COAL CO. V. BARKLEY, Supra; STATE OF NEBRASKA V. UNITED STATES (D.C. Neb. 1966) 255 F. Supp. 718).

The abandonment proceedings involved herein concerned the trackage owned by the Defendant Railroad (that shown in orange on Exhibit "A") the northern portion of which had not been in service since 1967. The trackage leased from the Fort Dodge, Des Moines & Southern Railway (shown in green on Exhibit "A") was not involved directly in said abandonment proceedings.

This controversy involved questions which demand the exercise of administrative discretion requiring the special knowledge, experience, and services of the I.C.C. to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the purposes of the Interstate Commerce Act, as amended.

The Court CONCLUDES that although a carrier has an absolute duty to provide transportation service, in providing the service the carrier is not required to do any more than what is reasonable. The questions raised in an abandonment proceeding all involve a reasonableness standard—what the public convenience and necessity require ((49 U.S.C.A. Sec. 1a(4); I.C.C. V. MAINE

C. R.R., Supra; MIDLAND VALLEY COAL CO. V. BARKLEY, Supra). The public's general right to rail transportation is therefore qualified by a railroad's right, with permission, to abandon a particular line. When an abandonment has occurred, the question is not whether there has been a failure to provide transportation service, but whether such failure was justified. The rights of the parties in such a case must be governed by the rules relating to abandonments rather than the rules on the general duty of providing transportation service.

In this case, since an abandonment was involved, Kalo's remedy lay in the federal court and it has no cause of action in this court.

RES JUDICATA/PRECLUSION

Both Kalo and the Defendants raise issues of issue preclusion.

The philosophical basis for the doctrine of collateral estoppel is that a party should have a full and fair day in court to be heard on the issue. On the other hand, the basis on which the doctrine of issue preclusion rests is that the parties ought not to be permitted to litigate the same issue more than once (GOOLSBY V. DERBY (Iowa, 1971) 189 N.W. 2d 909, 915).

To bar further litigation on a specific issue four requirements must be established:

(1) Issue concluded must be identical.

(2) Issue must have been raised and litigated in the prior action.

(3) The issue must have been material and relevant to the disposition of the prior action, and

(4) The determination made of the issue in the prior action must have been necessary and essential to the resulting damage (SCHNEBERGER V. UNITED STATES FIDELITY & GUAR. CO. (Iowa, 1973) 213 N.W. 2d 913, 917).

Plaintiff brought suit against the Defendant Railroad, a Delaware corporation with its principal place of business in Illinois, and Jack Chmeler, a resident of Iowa. The within cause was removed to the United States District Court, Northern District of Iowa, Central Division and Defendant Railroad contended that Defendant Chmeler was fraudulently joined solely for the purpose of defeating removal jurisdiction.

Thereafter Kalo filed its motion to remand and Defendant Railroad filed its motion to dismiss in that said United States District Court lacked jurisdiction over the subject matter in that Kalo's sole remedy was injunctive relief pursuant to 49 U.S.C.A. Sec. 1(20) when it was alleged there was an illegal abandonment under 49 U.S.C.A. Sec. 1(18).

Plaintiff contends that the order of the Honorable William C. Hanson, Judge, United States District Court, Northern District of Iowa, constituted a finding and adjudication that the state court had jurisdiction of the subject matter and Defendants are precluded from raising the issue again.

Said order concludes as follows:

> "The Court has carefully studied the plaintiff's petition and in particular Paragraphs 2 and 5 thereof. While the allegations therein contained are rather broad, the Court without introduction of evidence cannot discern whether Jack Chmeler's alleged acts border on active negligence or mere nonfeasance. Thus, the Court must conclude that "there is a possibility that the plaintiff has stated a cause of action," and that the joinder of Jack Chmeler was not fraudulent.
>
> Accordingly, IT IS ORDERED that the plaintiff's Motion to Remand be, and the same is, hereby sustained for want of subject matter jurisdiction.
>
> IT IS FURTHER ORDERED that this cause of action be remanded to the District Court of the State of Iowa, in and for Webster County."

Notwithstanding language contained in said order, said order was a ruling upon Kalo's Motion to Remand only. Said order specifically recites that the basis of the order was upon the allegations contained within Kalo's petition without the introduction of evidence and was bottomed on the conclusion that there was a "possibility that the plaintiff has stated a cause of action" against Jack Chmeler and therefore not fraudulent. The basis of said order was that with the inclusion of Jack Chmeler, a citizen of Iowa, as a defendant, the diversity of citizenship requirement of 28 U.S.C.A. Sec. 1332 was defeated and the subject matter jurisdiction of said court was therefore defeated.

The Court CONCLUDES that there is not an issue of identical nature in the instant case.

The Defendants contend that factual issues that are determinative of the present lawsuit have already been decided by a valid and final judgment of the Interstate Commerce Commission in the Kalo Line Abandonment Proceedings, in which both the Defendant Railroad and Kalo were parties.

On the 16th day of November, 1973, the Defendant Railroad filed with the I.C.C. an application seeking a certificate of public convenience and necessity permitting abandonment of the Kalo line (the line marked in orange on the attached Exhibit "A").

Notice of the proposed abandonment was served on Kalo on the 19th day of November, 1973. On or about the 18th day of September, 1975, the I.C.C. gave notice to Kalo as to the procedure to be followed in this particular proceeding and Kalo became a party in said proceedings protesting said abandonment.

On the 19th day of May, 1976, after hearing on April 30, 1976, the Interstate Commerce Commission, Review Board Number 5 found that Kalo, the protestant therein, was in default; that service on the Kalo line had been disrupted several times in the past by landslides; that

in 1967 a landslide occurred on the line which caused the Defendant Railroad to continue service to Kalo through the lease of tracks from another carrier; that, in 1973, a landslide caused the termination of service over the leased tracks; that, due to the soil condition and mining activities in the area, repairs of the leased track would not be sufficient to insure continuous operation on the line; that the cessation of service occurred because of conditions over which Defendant Railroad had no control, not because of wilful abandonment; and, that under the circumstances, continued operation of the line would be an unnecessary burden on Defendant Railroad and on interstate commerce.

Thereafter Kalo filed its petition for reconsideration of said I.C.C. order which contained a service date of May 19, 1976.

On the 30th day of September, 1976, the Interstate Commerce Commission, Division 3, acting as an Appellate Division, found that the order of the Commission, Review Board Number 5 was not erroneous; that the petition for reconsideration of Kalo set forth no material facts or arguments in addition to those previously considered in the proceedings; denied Kalo's petition for reconsideration; and, affirmed the previous order of May 19, 1976.

In order for Kalo to be successful against the Defendant Railroad in this court, there must be proof by a preponderance of the evidence that Defendant Railroad failed to provide cars or transportation to Kalo or that Defendant Railroad was negligent in the maintenance of its line, as opposed to failure to provide cars and transportation because of lawful abandonment.

The I.C.C. made a final determination of fact that this is an abandonment case.

The I.C.C. further made a final determination of fact "that the cessation of service occurred because of conditions over which applicant (Defendant Railroad) had no control, not because of wilful abandonment," and, that,

"due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line."

In abandonment proceedings before the I.C.C. the question of whether the deterioration of a line is due to a railroad's negligence or due to conditions beyond its control is always a concern in abandonment proceedings (MISSOURI-KANSAS-TEXAS RAILROAD COMPANY ABANDONMENT BETWEEN ALTOS AND FORGAN, OKLAHOMA 338 I.C.C. 728, 743-748 (1971)).

It was upon a finding that Defendant Railroad had done nothing illegal or negligent that the final determination of the I.C.C. was reached.

The rule of res judicata/preclusion applies to judicial and quasi-judicial acts of public officers and boards as to the judgments of courts having general judicial powers (RILEY V. BD. OF TRUSTEES OF POLICEMEN'S PENSION FUND (1930) 210 Iowa 449, 455, 228 N.W. 578, 851; BANKERS LIFE CO. V. CITY OF EMMETSBURG (1938) 224 Iowa 1287, 278 N.W. 311; TIDEWATER OIL COMPANY V. JACKSON (10th Cir. 1963) 320 F. 2d 157, 161; LANDRETH V. WABASH R. CO. (7th Cir. 1948) 153 F. 2d 98, 100).

Where a federal agency has, within the scope of its authority, made a formal administrative determination of a factual issue, a party that had an opportunity to litigate the issue before the federal agency may take advantage of statutory provisions or appeal of the agency's decision, but the party may not relitigate the issue by commencing an action in a court of original jurisdiction (SIBA CORP. V. WEINBERGER (1973) 412 U.S. 640, 644, 93 S. Ct. 2495, 37 L. Ed. 2d 230, 234). This doctrine is applicable to judgments rendered by the I.C.C. (SEATRAIN LINES, INC. V. PENNSYLVANIA R. CO. (3rd Cir. 1953) 207 F. 2d 255, 259).

The present parties took opposite sides in the proceeding in the I.C.C.; said proceedings were in the I.C.C.

which has specialized knowledge and experience in this area; Kalo's claim was sizeable which reasonably should have been known on or about the 14th day of November, 1973, the date Defendant Railroad made its application to the I.C.C., and, certainly known as of the 13th day of September, 1974, the date the petition was filed herein; and, future litigation was reasonably foreseeable at or about the time that the Defendant Railroad filed its application to abandon the line in November, 1973.

The Court CONCLUDES that the matters now raised by the petition, as amended, have been determined adversely to Kalo by the I.C.C. and that, because of the determination by the I.C.C., Kalo is collaterally estopped from again litigating them.

AGENT/EMPLOYEE

Plaintiff's petition alleges that the Defendant Jack Chmeler is and was an agent for the Defendant Railroad and has been in charge of the operation of said railroad at all times material herein. Plaintiff further alleges that Jack Chmeler operated as a railroad common carrier in Webster County, Iowa, and prior to April, 1973, provided railroad service to the Kalo plant. Further that Defendant Chmeler after April, 1973, refused to give service to Kalo or furnish cars after repeated requests to him. As a consequence thereof Kalo prays for a judgment against him for $350,000.00 and costs.

The undisputed evidence is that Defendant Chmeler was the freight agent in Fort Dodge, Iowa, from July 17, 1972-December 15, 1974, and as such either he or his subordinates received car orders. His immediate superior is the trainmaster which is a separate department head as distinguished from the roadmaster. The evidence shows that the Kalo line was taken out of service by the roadmaster because of inability to stabilize the alignment of tracks.

There is a complete failure of proof to show that Defendant Chmeler at any time acted as a railroad common

carrier. There is also a failure of proof to show that Defendant Chmeler personally, refused to give service to Kalo or furnish cars to Kalo.

The Court CONCLUDES that there has been a failure of proof to show that Defendant Chmeler had a duty to provide car service or transportation to Kalo as a common carrier by railroad in either intrastate or interstate transportation of freight for hire.

In Divisions II and III Kalo alleges again that Defendant Chmeler operated as a railroad common carrier in Webster County, Iowa, and operated a line to the Kalo plant; that Kalo shipped its products over Defendant Chmeler's line; that Defendant Chmeler failed to maintain the tracks in a proper manner and neglected and refused to deliver cars on order; that he delivered cars to Kalo which were unsuitable for use by reason of being dirty, broken and unworthy; that he failed and neglected to properly maintain the railroad right-of-way; and, as a result of the negligence of the Defendant Chmeler Kalo suffered damages in the amount of $350,000.00 and punitive damages in the amount of $150,000.00. Further, as a result of the Defendant Chmeler's acts of interference with Kalo's contracts, Kalo was damaged in the amount of $100,000.00.

An agent is not responsible to a third person for injury resulting from mere nonfeasance, meaning the omission of the agent to perform a duty owed solely to its principal by reason of his agency (CRAMBLITT V. PERCIVAL-PORTER CO. (1916) 176 Iowa 733, 742-743, 158 N.W. 541, 545; KNIGHT V. ATLANTIC COAST LINE (5th Cir. 1934) 73 F. 2d 76; TOADVINE V. CINCINNATI, N. O. & T. P. RY. (D.C. Ky. 1937) 20 F. Supp. 226; DAVIS V. ST. LOUIS & S. F. RY. CO. (N.D. Okl. 1934) 8 F. Supp. 519).

"An agent, while obeying the command or performing the service of the principal, is not justified in committing a tort; and if he does, not only the principal, but the agent, may be made to answer in damages therefor. But

where a duty rests on the principal, and not on the agent, its nonperformance by the latter creates no liability as against him, if injury results. True, he may owe a duty to the principal to faithfully discharge his duties as agent; but he owes no duty to others, except that, in the performance of those duties, he shall not do anything which will cause injury to them. If the agent fails to perform a duty which he owes to the principal, and, by reason of such nonperformance or neglect of duty, a third person sustains injury, no action can be maintained against the agent by such third party person on account thereof" (CRAMBLITT V. PERCIVAL-PORTER CO., Supra, 176 Iowa at 744-745, 158 N.W. at 545).

The evidence does not show that Chmeler had any duty with respect to Kalo except such as was imposed by his contract of employment as freight agent for Defendant Railroad. The evidence fails to show facts giving rise to a duty of Chmeler to Kalo with reference to providing car service, maintenance of the roadbed, or providing transportation.

The Court CONCLUDES that Kalo has failed to prove a cause of action against the Defendant Chmeler.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, as follows:

(1) That the Defendants, the Chicago and North Western Transportation Company and Jack Chmeler a/k/a Jack Scemeler, have judgment against the Plaintiff, Kalo Brick & Tile Company, dismissing its petition herein.

(2) That the Defendants, The Chicago and North Western Transportation Company and Jack Chmeler, a/k/a Jack Scemeler, have judgment against the Plaintiff, Kalo Brick & Tile Company, dismissing Division II of its petition, as amended, herein.

(3) That the Defendants, The Chicago and North Western Transportation Company and Jack Chmeler,

a/k/a Jack Scemeler, have judgment against the Plaintiff, Kalo Brick & Tile Company, dismissing Division III of its petition, as amended, herein.

(4) That said Defendants have judgment against said Plaintiff for the costs of this action taxed by the Clerk in the sum of $ .....

By The Court
Russell J. Hill, Judge

Copies To:
Mitchell, Murray, Blackburn & Coleman, P.C.
Gamble, Riepe, Burt, Webster & Fletcher

TESTIMONY OF JERRY SCHNURR, CORPORATE OFFICER OF KALO, FROM TRANSCRIPT PAGE 321, LINE 17, TO PAGE 322, LINE 2:

Q. In other words, some of your shipping would have been local? A. Correct.
Q. And that wouldn't—you wouldn't have intended to ship that by rail anyway? A. No, sir.
Q. Basically, you shipped long haul rail and short haul truck? A. Basically we shipped the majority of our products by rail. The product that went to our distributor, the local (Tr. p. 322) product and the product within the State of Iowa, I could say would have been shipped by truck.

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423

I, ROBERT L. OSWALD, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Order of the Commission, entered April 30, 1976, in Docket No. AB-1 (Sub No. 24), Chicago & North Western Transportation Company—Abandonment Between Fort Dodge and Kalo, in

Webster County, Iowa, the original of which is now in file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 8th day of October, A.D., 1976.

/s/ Robert L. Oswald

SECRETARY OF THE
INTERSTATE COMMERCE
COMMISSION

ORDER

SERVICE DAY — May 19, 1976

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 5, held at its office in Washington D.C., on the 30th day of April, 1976.

AB-1 (Sub-No. 24)

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN FORT DODGE AND KALO, IN WEBSTER COUNTY, IOWA

It appearing, That by application filed November 16, 1973, Chicago & North Western Transportation Company, pursuant to sections 1(18-20) of the Interstate Commerce Act, seeks a certificate of public convenience and necessity permitting abandonment of the line of railroad beginning at mile post 222.0 at Fort Dodge and extending in a south-easterly direction to milepost 227.6 at Kalo, a distance of approximately 5.6 miles, all in Webster County, Iowa;

It further appearing, That by order of September 12, 1975, the proceeding was set for handling under the modified procedure; that applicant timely filed a verified statement; that United States Gypsum Company, which was permitted to intervene by order of September 3, 1975, filed a statement in support of the application, but protestant, Kalo Brick & Tile Company did not file a veri-

fied statement in opposition as required; and that, pursuant to section 1100.46(b) of the Commission's General Rules of Practice, protestant is deemed to be in default and entitled to no further formal proceedings;

It further appearing, That by order of September 12, 1975, the proceeding was set for handling under the modified procedure; that applicant timely filed a verified statement; that United States Gypsum Company, which was permitted to intervene by order of September 3, 1975, filed a statement in support of the application, but protestant, Kalo Brick & Tile Company did not file a verified statement in opposition as required; and that, pursuant to section 1100.46(b) of the Commission's General Rules of Practice, protestant is deemed to be in default and entitled to no further formal proceedings;

It further appearing, That service on the line has been disrupted several times in the past by landslides, but applicant made necessary repairs to enable continuation of service; that, in 1967, a landslide occurred which could have been repaired, but, due to the soil condition, said repairs would have been only of a temporary nature; that service to shippers was continued through the lease of tracks from another carrier; that, in 1973, a landslide caused the cessation of operations over this leased track; that the cost of rehabilitation of the applicant's line is estimated to be in excess of $150,000; that the cost of rehabilitation of the leased track is estimated to be in excess of 100,000; that, due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line; that Kalo Brick & Tile Company was the only shipper located on the line when it was last in operation; and that the company has been closed for two years;

It further appearing, That the cessation of service occurred because of conditions over which applicant had no control, not because of willful abandonment; that it is well settled that a shipper cannot insist that a burden-

some line be maintained solely for its own use; *Moeller* v. *I.C.C.*, 201 F. Supp. 583 (S. D. Iowa, 1962); *Village of Candor* v. *U. S.*, 151 F. Supp. 889 (N. D. N Y 1957); *United States Feldspar Corporation* v. *U. S.* 38 F. 2d 91 (N. D. N Y 1930); and that, under these circumstances, continued operation of the line would be an unnecessary burden on applicant and on interstate commerce;

RECEIVED
MAY 21, 1976
LAW DEPARTMENT
C. & N. W. TRANS. CO.

It further appearing, That an environmental threshold assessment survey has been prepared by the Commission and made available for public inspection upon request; that such survey has found that no significant impact on the environment would result from the approval of the application; that by order of the Commission, Commissioner Tuggle, served June 25, 1975, it was determined that based on the aforesaid threshold assessment survey, no environmental impact statement need be issued in this proceeding as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331 *et seq.;* that appropriate notice of such determination has been published as directed by this Commission; that this Commission received no substantive comments as to said determination as of the date hereof; that said threshold assessment survey is a part of the record in this proceeding and has been weighed in considering the issues herein; and that, and the Board so finds, the economic advantages to be gained by applicant and the burdens to be avoided by the applicant and interstate commerce through the abandonment outweigh any adverse environmental factors; and

It further appearing, and the Board so finds, That the present and future public convenience and necessity permit abandonment by the Chicago & North Western Transportation Company of the above-described line of railroad, subject to the condition that employees shall be entitled for protection, to the conditions as set forth in *Chicago, B. & Q. R. Co. Abandonment,* 257 I.C.C. 700; and *provided, however,* that any responsible State agency and/or local government or other interested responsible organization be given the opportunity, for a period of 120 days from the date of actual abandonment to negotiate the purchase of all or any portion of the right-of-way of the line to be abandoned for public use at a purchase price on such terms as the parties may agree as just and reasonable, but not less than a purchase price ascertained in accordance with the principles controlling in condemnation proceedings;

It is ordered, That this order shall be effective 30 days from the date of service; and that upon this order becoming administratively final an appropriate notice of the finding heretofore made is to be published in the Federal Register pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended, as provided in the Notice of the Commission entitled "Procedures for Pending Rail Abandonment Cases", served March 31, 1976, and published in the Federal Register, 41 FR 13691 (March 31, 1976), which also describes the procedures to be used in submitting offers of subsidy;

It is further ordered, That in the event any person or government entity is considering an offer of financial assistance for the continued operations or acquisition of the subject line, then such person or government entity should give notice that it is considering an offer to provide financial assistance in written form by certified mail to carrier applicant and by first class mail to all parties of record and the Commission; that within 10 days from the date of receipt of such written notification, whether such notification is received before or after the Federal Regis-

ter publication, applicant shall furnish, with a copy to this Commission, to any person considering an offer of financial assistance the following: (1) its most recent report on the physical condition of the subject line of railroad; (2) a current report on the train service on the line and a current report on traffic and revenue attributable to the subject line; (3) an actual computation of the extent to which avoidable cost of providing rail service plus a reasonable return on the value of the rail properties involved exceed the revenues attributable to the line of railroad, as determined by the "Standards for Determining Rail Service Continuation Subsidies", 49 CFR 1125, which data will be used by the Commission to assist it in making the determination required by the statute;

It is further ordered, That within 15 days of the date of publication of notice of the finding in this proceeding in the Federal Register any person, including a government entity, who may have been considering the making of an offer of financial assistance for the purpose of continuation of the rail service involved herein shall make a bona fide offer of financial assistance to carrier applicant and shall file with the Commission with an appropriate reference to this proceeding the following: (1) a bona fide offer of financial assistance; (2) information and data which demonstrates that the offeror of financial assistance is financially responsible, including, in the event the offeror is a person other than a government entity, appropriate financial data (a) consisting of a balance sheet and accompanying schedules as of a date not earlier than 6 months prior to the date of such submission, and (b) an income statement showing its revenues, expenses, and net income for the current calendar year to the latest available date and for each of the two preceding calendar years, or in the event the offeror is a government entity, a statement indicating that it has appropriate authority and necessary funds enabling it to enter into contracts affording financial assistance for rail service operations or acquisitions of rail lines, and (3) information to support a finding by the Commission that such

offer of financial assistance will likely cover the difference between the revenues attributable to the line of railroad and the avoidable costs of providing rail freight service over the line, plus a reasonable return on the value of the line; or that it is likely to cover the cost of acquiring all or a portion of the line and thereby meet the requirements of section 1a(6)(a) (ii)(A) or (B) of the Act, as amended;

It is further ordered, That if the Commission finds that a financially responsible person has offered financial assistance in accordance with the procedures outlined above, as published in the above-referenced Notice of March 31, 1976, in the Federal Register, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or government entity to enter into a binding agreement with the applicant railroad to provide financial assistance for continued rail service or to effect a purchase of the rail line;

It is further ordered, That when the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement, including any extensions or modifications, is in effect;

It is further ordered, That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding; and that on the lower left hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RSCP";

And it is further ordered, That, subject to the conditions set forth above, an appropriate certificate of abandonment will be issued, and that the applicant shall not effect abandonment prior to the effective date of such certificate of abandonment.

By the Commission, Review Board Number 5, Members Krock, Pohost, and Taylor.

ROBERT L. OSWALD,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423

I, H. GORDON HOMME, JR., Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Order of the Commission, entered September 23, 1976, in Docket No. AB-1 (Sub No. 24), Chicago & North Western Transportation Company—Abandonment Between Fort Dodge and Kalo, in Webster County, Iowa, the original of which is now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 8th day of October, A.D., 1976.

/s/ H. Gordon Homme, Jr.,
ACTING SECRETARY OF THE
INTERSTATE COMMERCE
COMMISSION

SERVICE DATE— Sep. 30, 1976

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 23rd of September ....., 1976.

AB 1(Sub-No. 24)

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN FORT DODGE AND KALO, IN WEBSTER COUNTY, IOWA

Upon consideration of the record in the above-entitled proceeding including the order of the Commission, Review Board No. 5, served May 19, 1976, authorizing the Chicago & North Western Transportation Company to abandon the line described above; the pleading of protestant Kalo Brick & Tile Company, filed June 9, 1976, which will be treated as a petition for reconsideration of the order of the Commission, Review Board No. 5, served May 19, 1976; and the replies to protestant's petition for reconsideration filed by applicant on July 2, 1976, and by intervenor, United States Gypsum Company, filed on July 19, 1976;

It appearing, That the order of the Commission, Review Board No. 5, is not shown to be erroneous on the basis of the record made by the parties complying with the order for modified procedure; that said petition sets forth no material facts or arguments in addition to those previously considered in the proceeding; and that no showing has been made warranting reconsideration of said order of the Commission, Review Board No. 5;

It is ordered, That the petition for reconsideration be, and it is hereby denied.

It is further ordered, That the order of the Commission, Review Board No. 5, served May 19, 1976, shall be effective 20 days from the date of service of the order herein.

By the Commission, Division 3, acting as an Appellate Division, Commissioners Brown, MacFarland and Corber (Commissioner MacFarland not joining in the majority statement).

/s/ H. Gordon Homme, Jr.
Acting Secretary

(SEAL)

TESTIMONY OF JERRY SCHNURR, OFFICER OF KALO BRICK AND TILE COMPANY; (transcript page 321, line 17 to page 322, line 2; addendum to appendix in the Supreme Court of Iowa, number 2-60942, page 5)

Q. In other words, some of your shipping would have been local? A. Correct.

Q. And that wouldn't — you wouldn't have intended to ship that by rail anyway? A. No, sir.

Q. Basically, you shipped long haul rail and short haul truck? A. Basically we shipped the majority of our products by rail. The products that went to our distributor, the local product and the product within the State of Iowa, I could say would have been shipped by truck.

49 U.S.C.A.

§ 1, par. (4). Duty to furnish transportation and establish through routes; division of joint rates. It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers. Feb. 4, 1887, c. 104, Pt. I, §1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June

18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(c), 54 Stat. 899.

Section 1, of which this paragraph is apart, is set out in toto at pp. 18-28.

§ 1, par. (10). "Car service" defined. The term "car service" in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101, Feb. 28, 1920, c. 91, § 402, 41 Stat. 476; Aug. 9, 1935, c. 498, §1, 49 Stat. 543.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph was added to section 1 of the Act of 1887, by the amendatory Act of May 29, 1917, and was amended to read as above by the Transportation Act of Feb. 28, 1920, and given the number "(10)".

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (11). Duty to furnish car service; rules and regulations. It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat.

101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 476; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph was added by Act May 29, 1917 and was amended to read as above by the Transportation Act of Feb. 28, 1920, and was given the number "(10)."

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (13). Rules and regulations as to car service to be filed, etc. The Commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, §402, 41 Stat. 477; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in original Interstate Commerce Act of 1887 or the earlier amendatory acts, but was added to section 1 by the Act of May 29, 1917, and was amended to read as above by the Transportation Act of Feb. 28, 1920, and given the number "(13)."

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (14). Establishment by Commission of rules, etc., as to car service. (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

(b) It shall be unlawful for any common carrier by railroad or express company, subject to this chapter, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: *Provided,* That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 476; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 4(a), 54 Stat. 901.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in the original Interstate Commerce Act of 1887 or the earlier amendatory acts, but was added to section 1, by the amendatory Act of May 29, 1917 and was amended by the Transportation Act of Feb. 28, 1920, and given the number "(14)."

1940 Amendment. Act Sept. 18, 1940, amended paragraph generally.

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (17). Directions of Commission as to car service; disobedience; rights of States; bribery. (a) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) of this section may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this chapter, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: *Provided, however,* That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this chapter and except as otherwise provided in this chapter.

(b) It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to any person acting for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this chapter to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. Any person who violates the provisions of this subparagraph shall be deemed guilty of a misdemeanor and be subject for each offense to a fine of not more than $1,000, or imprisonment in the penitentiary for a term of not more than two years, or both such fine and imprisonment. Feb. 4, 1887, c. 104, Pt. I. § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 477; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 4, (b), 54 Stat. 899; Aug. 12, 1958, Pub. L. 85-625, § 3, 72 Stat. 570.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in the original Interstate Commerce Act of 1887 or the earlier amendatory acts. The first part of this paragraph down to the proviso was added by the amendatory Act of May 29, 1917, was amended by the Transportation Act of Feb. 28, 1920, and was given the number "(17)."

1958 Amendment. Subd. (a) amended by Pub. L. 85-625 which inserted "and except as otherwise provided in this chapter" following "made under the provisions of this chapter".

1940 Amendment. Act Sept. 18, 1940, amended paragraph by designating existing provisions as subd. (a) and by adding subd. (b).

Subd. (b) added by Act Sept. 18, 1940.

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (18). Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402,

41 Stat. 477; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 4(c), 54 Stat. 901.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in the original Interstate Commerce Act of 1887 nor in the earlier amendatory acts. It was added by the Transportation Act of Feb. 28, 1920, and given the number "(18)."

1940 Amendment. Act Sept. 18, 1940, amended paragraph by adding last sentence.

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (20). Issuance of certificate by Commission; unlawful extension or abandonment of lines. The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer,

receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 478.

Section 1, of which this paragraph is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in the original Interstate Commerce Act of 1887, nor in the earlier amendatory acts. It was added by the Transportation Act of Feb. 28, 1920, and given the number "(20)."

§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. Feb. 4, 1887, c. 104, Pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

Historical Note

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 9. Remedies of persons damaged; election; witnesses

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. Feb. 4, 1887, c. 104, Pt. I, § 9, 24 Stat. 382; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

Historical Note

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

479.3 Duty to furnish cars and transport freight

Every railway corporation shall upon reasonable notice, and within a reasonable time, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch, and provide and keep suitable facilities for the

receiving and handling thereof at any depot on the line of its road.

479.122 Liability for negligence of employees

Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers, or other employees thereof, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

IN THE DISTRICT COURT OF THE STATE OF IOWA

IN AND FOR WEBSTER COUNTY

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, Successor in Interest in CHICAGO AND NORTHWESTERN RAILWAY COMPANY and JACK SCEMELER,

Defendants.

Law No. 45,664

SEPARATE ANSWER OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Comes Now defendant Chicago and North Western Transportation Company, and, for its separate answer

to the Petition filed herein by the plaintiff, Kalo Brick & Tile Company, respectfully states:

1. This defendant does not have sufficient information to form a belief as to the allegations contained in paragraph 1 thereof and therefore denies the same.

2. For its answer to the allegations contained in paragraph 2 thereof, this defendant specifically denies that defendant Jack Chmeler (erroneously referred to herein as "Scemeler") and his predecessor agents have been in charge of the operation of the business of the Chicago and North Western Transportation Company and its predecessor at all times material hereto. This defendant admits the balance of the allegations of paragraph 2 thereof.

3. This defendant does not have sufficient information to form a belief as to the allegations contained in paragraph 3 thereof and therefore denies the same.

4. For its answer to the allegations contained in paragraph 4 thereof, this defendant specifically denies that defendant Jack Chmeler operated as a railroad common carrier in Webster County, Iowa, and in particular a line from Fort Dodge, Iowa, to Kalo, Iowa, and to plaintiff's plant. This defendant further specifically denies that, for many years, the foregoing line of track was operated by defendant Jack Chmeler and his predecessors. This defendant further specifically denies that, for many years, the plaintiff shipped its products over defendant Jack Chmeler's line. This defendant further specifically denies that plaintiff built up its business on the basis of the railroad service that was available until April of 1973. This defendant admits the balance of the allegations of paragraph 4 thereof.

5. For its answer to the allegations contained in paragraph 5 thereof, this defendant specifically denies that, prior to April of 1973, defendant Jack Chmeler gave railroad service to the plaintiff and that, after April of 1973, defendant Jack Chmeler failed and refused to

give service to the plaintiff or to furnish any railway cars or to send trains to the plaintiff's plant at Kalo, Iowa. This defendant further specifically denies that plaintiff made repeated requests for service and for cars to defendant, its agent and, in particular, its agent defendant Jack Chmeler. This defendant further specifically denies that defendant Jack Chmeler owed any common law or statutory duties as a common carrier of freight to plaintiff. This defendant further specifically denies that this defendant failed and refused to perform the common law and statutory duties of a common carrier of freight to plaintiff. This defendant further specifically denies that, as a result, plaintiff was forced to give up its business resulting in substantial damages to it. This defendant further specifically denies that defendant Jack Chmeler had any duty to operate as a common carrier. This defendant further specifically denies that this defendant failed and refused to operate as a common carrier and to perform its duty to plaintiff as such and that plaintiff has been damaged in the sum of not less than $350,000.00.

6. For its further answer to the allegations thereof, this defendant affirmatively alleges that Petition herein fails to state a claim on which any relief can be granted.

7. For its further answer to the allegations thereof, this defendant affirmatively alleges that, at all times material hereto, this defendant was a common carrier by railroad was engaged in the interstate transportation of freight for hire, and the furnishing of services in connection therewith, and was subject to the provisions of the Interstate Commerce Act, 49 U.S.C.A. §§ 1, *et seq.*

8. For its further answer to the allegations thereof, this defendant affirmatively alleges that, at all times material hereto, this defendant was the owner of a line of railroad which ran from Mile Post 222.0 in Fort Dodge, Iowa, to Mile Post 227.6 at Kalo, Iowa, a distance of 5.6 miles.

9. For its further answer to the allegations thereof, this defendant affirmatively alleges that, prior to April of 1973, this defendant provided its services as a common carrier by railroad to the facility owned and operated by plaintiff at Kalo, Iowa, by means of said line of railroad.

10. For its further answer to the allegations thereof, this defendant affirmatively alleges that, prior to April of 1973, plaintiff shipped its products in interstate commerce from the facility owned and operated by plaintiff at Kalo, Iowa, to various points in the United States by means of said line of railroad.

11. For its further answer to the allegations thereof, this defendant affirmatively alleges that, in April of 1973, an embankment slide occurred on said line of railroad.

12. For its further answer to the allegations thereof, this defendant affirmatively alleges that said embankment slide made it impossible for this defendant to provide its services as a common carrier by railroad to the facility owned and operated by plaintiff at Kalo, Iowa, by means of said line of railroad.

13. For its further answer to the allegations thereof, this defendant affirmatively alleges that, on November 14, 1973, this defendant made application to the Interstate Commerce Commission pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C.A. §§ 1, et seq., for a certificate of public convenience and necessity authorizing this defendant to abandon said line of railroad.

14. For its further answer to the allegations thereof, this defendant affirmatively alleges that said application is still pending before the Interstate Commerce Commission and the Interstate Commerce Commission has not granted or denied said application.

15. For its further answer to the allegations thereof, this defendant affirmatively alleges that, by reason of the foregoing, the sole remedies available to plaintiff

are either participation in the abandonment proceeding before the Interstate Commerce Commission pursuant to the provisions of 49 U.S.C.A. §§ 1(18) and 1(19) or a suit for an injunction pursuant to the provisions of 49 U.S. C.A. § 1(20).

16. For its further answer to the allegations thereof, this defendant affirmatively alleges that, by reason of the foregoing, this court does not have jurisdiction of the subject matter hereof.

Wherefore, having fully answered, this defendant prays that the Petition filed herein be dismissed at plaintiff's costs.

GAMBLE, RIEPE, BURT, WEBSTER
& FLETCHER
By ORIGINAL SIGNED

FRANK W. DAVIS, JR.
1021 Fleming Building
Des Moines, Iowa 50309
Telephone: 515-282-0216
Attorneys for Defendant,
Chicago and North Western
Transportation Company.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelopes in a United States Post Office depository in Des Moines, Iowa, on the 13 day of May, 1975

/s/ Barbara Natt

IN THE DISTRICT COURT OF THE STATE OF IOWA

IN AND FOR WEBSTER COUNTY

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, Successor in Interest in CHICAGO AND NORTHWESTERN RAILWAY COMPANY and JACK SCHMELER,

Defendants.

Law No. 45,664

ANSWER OF DEFENDANT RAILROAD TO PLAINTIFF'S AMENDMENT TO PETITION
Filed District Court '76 Oct 15

DIVISION II

For answer to Division II of plaintiff's Amendment To Petition, defendant Chicago and North Western Transportation Company states:

1. This defendant does not have sufficient information to form a belief as to the allegations contained in Paragraph 1 of Division II of plaintiff's Amendment to Petition.

2. Paragraph 2 of Division II of plaintiff's Amendment To Petition is admitted.

3. This defendant does not have sufficient information to form a belief as to the allegations contained in Paragraph 3 of Division II of plaintiff's Amendment to Petition.

4. For answer to Paragraph 4 of Division II of plaintiff's Amendment To Petition, this defendant repleads Paragraph 4 of its Separate Answer to plaintiff's Petition as if fully set out herein.

5. For answer to Paragraph 5 of Division II of plaintiff's Amendment To Petition, this defendant states that

during the early 1960s this defendant succeeded in interest to the rights, obligations and liabilities of the Minneapolis and St. Louis Railroad Company and began to operate its trains over the track referred to in plaintiff's Petition. This defendant specifically denies that defendant Schmeler ever succeeded in interest to the rights, obligations and liabilities of the Minneapolis and St. Louis Railroad Company and specifically denies that defendant Schmeler ever operated trains over the track referred to in plaintiff's Petition.

6. The allegations of Paragraph 6 of Division II of plaintiff's Amendment To Petition are specifically denied.

7. The allegations of Paragraph 7 of Division II of plaintiff's Amendment To Petition are specifically denied.

8. The allegations of Paragraph 8 of Division II of plaintiff's Amendment To Petition are specifically denied.

9. The allegations of Paragraph 9 of Division II of plaintiff's Amendment To Petition are specifically denied.

10. The allegations of Paragraph 10 of Division II of plaintiff's Amendment To Petition are specifically denied.

11. The allegations of Paragraph 11 of Division II of plaintiff's Amendment To Petition are specifically denied.

DIVISION III

For answer to Division III of plaintiff's Amendment To Petition, defendant Chicago and North Western Transportation Company states:

1. For answer to Paragraph 1 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 1 of Division II of this answer as if fully set out herein.

2. For answer to Paragraph 2 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 2 of Division II of this answer as if fully set out herein.

3. For answer to Paragraph 3 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 3 of Division II of this answer as if fully set out herein.

4. For answer to Paragraph 4 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 4 of Division II of this answer as if fully set out herein.

5. For answer to Paragraph 5 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 5 of Division II of this answer as if fully set out herein.

6. For answer to Paragraph 6 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 6 of Division II of this answer as if fully set out herein.

7. For answer to Paragraph 7 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 7 of Division II of this answer as if fully set out herein.

8. For answer to Paragraph 8 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 8 of Division II of this answer as if fully set out herein.

9. This defendant specifically denies the allegations of Paragraph 9 of Division II of plaintiff's Amendment To Petition.

10. The allegations of Paragraph 10 of Division III of plaintiff's Amendment To Petition are specifically denied by this defendant.

WHEREFORE, defendant Chicago and North Western Transportation Company prays that Division III of plaintiff's Amendment To Petition be dismissed at plaintiff's costs.

DIVISION IV

AFFIRMATIVE DEFENSES

As affirmative defenses to the allegations of Division II and Division III of plaintiff's Amendment To Petition, defendant Chicago and North Western Transportation Company states:

1. On November 16, 1973 this defendant filed with the Interstate Commerce Commission an Application seeking a Certificate of Public Convenience and Necessity permitting abandonment of the line of railroad ("Kalo Line") beginning at mile post 222.0 at Fort Dodge and extending in a southeasterly direction to mile post 227.6 at Kalo, Iowa, the line of railroad that is the subject of Division II and III of plaintiff's Amendment To Petition.

2. Plaintiff Kalo Brick & Tile Company was a party-protestant to the Kalo Line Abandonment proceedings before the Interstate Commerce Commission.

3. The following issues were raised in the Kalo Line Abandonment proceedings before the Interstate Commerce Commission:

(a) Had service on the line been disrupted prior to 1973 by landslides?

(b) If so, had this defendant made necessary repairs to enable continuation of service?

(c) Did a landslide occur in 1967 which, due to soil condition, could have been repaired only upon a temporary basis?

(d) When the 1967 landslide occurred, was service to shippers continued through the lease of tracks from another carrier?

(e) Did a landslide in 1973 cause cessation of operations over the tracks leased from the other carrier?

(f) What would be the cost of rehabilitation of this defendant's tracks?

(g) What would be the cost of rehabilitation of the tracks leased from the other carrier?

(h) Would such repairs be sufficient to insure continuous operations on the line?

(i) Was Kalo Brick & Tile Company the only shipper located on the line when it was last in operation?

(j) Did the cessation of service on the line occur because of willful abandonment by this defendant or did it occur because of conditions over which this defendant had no control?

(k) Under the circumstances, would continued operation of the line have been an unnecessary burden on this defendant?

4. Each of the issues set out in the preceding Paragraph 3 is also an issue in the instant lawsuit.

5. The order of Review Board Number Five of the Interstate Commerce Commission, entered April 30, 1976, rendered judgment on the issues set out in Paragraph 15 in the following manner:

(a) Service on the Kalo Line has been disrupted several times in the past by landslides.

(b) When such service disruptions occurred, this defendant made necessary repairs to enable continuation of service.

(c) In 1967 a landslide occurred which could have been repaired, but, due to the soil condition, such repairs would have been only of a temporary nature.

(d) Following the 1967 landslide, service to shippers was continued by this defendant through the lease of tracks from another carrier.

(e) In 1973 a landslide caused the cessation of operations over the track this defendant had leased from another carrier.

(f) The cost of rehabilitation of this defendant's railroad line would have been in excess of $150,000.

(g) The cost of rehabilitation of the track leased from the other carrier would have been in excess of $100,000.

(h) Due to soil condition and mining activities in the area, such repairs would not have been sufficient to insure continuous operation on the Kalo Line.

(i) Plaintiff Kalo Brick & Tile Company was the only shipper located on the line when it was last in operation.

(j) The cessation of service on the Kalo Line occurred because of conditions over which this defendant had no control, and not because of any intent by this defendant to abandon the line or cause a cessation of service.

(k) Under the circumstances, continued operation of the line would have been an unnecessary burden on this defendant.

6. By order of Review Board Number Five, entered April 30, 1976, the Board determined that the public convenience and necessity justified abandonment by this defendant of the Kalo Line.

7. By order of Review Board Number 5, entered April 30, 1976, protestant Kalo Brick & Tile Company was deemed to be in default and entitled to no further formal proceedings before the Commission. Protestant Kalo Brick & Tile Company was later allowed to file a Petition for Reconsideration.

8. By order entered September 23, 1976, served September 30, 1976, and received by this defendant's trial counsel October 8, 1976, the Interstate Commerce Commission, Division Three, acting as an Appellate Division, denied protestant Kalo Brick & Tile Company's Petition for Reconsideration and determined:

(a) That the order of the Commission, Review Board Number Five, was not shown to be erroneous on the basis of the record made by the parties complying with the order for modified procedure.

(b) That protestant Kalo Brick & Tile Company's Petition For Reconsideration set forth no material facts or arguments in addition to those previously considered in the proceeding.

(c) That no showing had been made by protestant Kalo Brick & Tile Company warranting reconsideration of the order of the Commission, Review Board Number Five.

9. The issues set out in Paragraph 3 of this Division IV have been determined by a valid final judgment to which such determination was necessary, and relitigation of those issues in the instant lawsuit is therefore precluded.

10. This defendant repleads Paragraph 6 of its Separate Answer to plaintiff's Petition as if fully set out herein.

11. This defendant repleads Paragraph 7 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

12. This defendant repleads Paragraph 8 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

13. This defendant repleads Paragraph 9 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

14. This defendant repleads Paragraph 10 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

15. This defendant repleads Paragraph 11 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

16. This defendant repleads Paragraph 12 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

17. This defendant repleads Paragraph 13 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

18. For its further answer to the allegations thereof, this defendant affirmatively alleges that, by reason of the foregoing, the sole remedies available to plaintiff were either participation in the Kalo Line Abandonment proceeding before the Interstate Commerce Commission pursuant to the provisions of 49 USCA Sections 1 (18) and 1 (19) or a suit for an injunction pursuant to the provisions of 49 USCA Section 1 (20).

19. This defendant hereby repleads Paragraph 16 of its Separate Answer to plaintiff's Petition as if fully set out herein.

WHEREFORE, this defendant prays that Divisions II and III of plaintiff's Amendment To Petition be dismissed at plaintiff's costs.

GAMBLE, RIEPE, BURT, WEBSTER
& FLETCHER
By /s/ James D. Polson
By /s/ Bruce Johnson
2600 Ruan Center
Des Moines, Iowa 50309
(515) 243-6251
—Attorneys for Defendant

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR WEBSTER COUNTY

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, Successor in Interest in CHICAGO AND NORTHWESTERN RAILWAY COMPANY and JACK SCHMELER,

Defendants.

Law No. 45,664

MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT RAILROAD AND DEFENDANT SCHMELER
(Filed Oct 18 76)

The Defendant Chicago and North Western Transportation Company and Defendant Schmeler respectfully move the Court for an Order granting summary judgment in favor of Defendants and against Plaintiff Kalo Brick & Tile Company, and as grounds therefore state:

1. On November 16, 1973 the Defendant Railroad filed with the Interstate Commerce Commission an Application seeking a Certificate of Public Convenience and Necessity permitting abandonment of the Kalo Line.

2. Plaintiff Kalo Brick & Tile Company was a party-protestant to the Kalo Line Abandonment Proceedings before the Interstate Commerce Commission.

3. In the Kalo Line Abandonment Proceedings the Interstate Commerce Commission made the following factual determinations:

(a) Service on the Kalo Line has been disrupted several times in the past by landslides.

(b) When such service disruptions occurred, this defendant made necessary repairs to enable continuation of service.

(c) In 1967 a landslide occurred which could have been repaired, but, due to the soil condition, such repairs would have been only of a temporary nature.

(d) Following the 1967 landslide, service to shippers was continued by this defendant through the lease of tracks from another carrier.

(e) In 1973 a landslide caused the cessation of operations over the track this defendant had leased from another carrier.

(f) The cost of rehabilitation of this defendant's railroad line would have been in excess of $150,000.

(g) The cost of rehabilitation of the track leased from the other carrier would have been in excess of $100,000.

(h) Due to soil condition and mining activities in the area, such repairs would not have been sufficient to insure continuous operation on the Kalo Line.

(i) Plaintiff Kalo Brick & Tile Company was the only shipper located on the line when it was last in operation.

(j) The cessation of service on the Kalo Line occurred because of conditions over which this defendant had no control, and not because of any intent by this defendant to abandon the line or cause a cessation of service.

(k) Under the circumstances, continued operation of the line would have been an unnecessary burden on this defendant.

4. The factual determinations listed above in Paragraph 3 are now part of and were necessary to a valid and final judgment of the Interstate Commerce Commission in the Kalo Line Abandonment Proceedings.

5. The issues decided by the factual determinations listed above in Paragraph 3 are material to the claim contained in Plaintiff's original Petition and to the claims contained in Division II and III in Plaintiff's Amendment to Petition.

6. The prior determination of the factual matters listed above in Paragraph 3 by the Interstate Commerce Commission in a proceeding to which Plaintiff Kalo Brick & Tile Company was a party precludes Plaintiff from relitigating those factual issues in the present litigation.

7. When the factual determinations of the Interstate Commerce Commission listed above in Paragraph 3 are adopted and applied to the claims made by the Plaintiff in the present lawsuit there remains no genuine question of material fact, and Plaintiff has, as a matter of law, failed to prove the claims stated in its original Petition and in Divisions I and II of its Amendment to Petition.

Wherefore, Defendant Chicago and North Western Transportation Company and Jack Schmeler pray that the Court grant this Motion For Summary Judgment in favor of Defendants and against the Plaintiff and dismiss this action, with costs taxes to the Plaintiff.

GAMBLE, RIEPE, BURT, WEBSTER,
& FLETCHER
By /s/ Bruce E. Johnson
Bruce E. Johnson
By /s/ J D Polson
James D. Polson
Attorneys for Defendants

Of Counsel
Gamble, Riepe, Burt, Webster & Fletcher
2600 Ruan Center
Des Moines, Iowa 50309
(515) 243-6251

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa
on the 18th day of Oct. 1976

/s/ B. Johnson

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR WEBSTER COUNTY

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, Successor in Interest in CHICAGO AND NORTHWESTERN RAILWAY COMPANY and JACK SCHMELER,

Defendants.

Law No. 45,664

DEFENDANT RAILROAD'S MOTION TO DISMISS
(Filed Nov 2 76)

Pursuant to a Stipulation of Record with plaintiff's Counsel that this Motion To Dismiss shall be treated as though it was first made at the close of plaintiff's evidence and renewed now at the close of all the evidence, the defendant Chicago and North Western Transportation Company resptctfully submits the following Motion To Dismiss:

DISMISSAL OF PLAINTIFF'S ORIGINAL PETITION

The defendant Chicago and North Western Transportation Company respectfully moves that the claim for relief alleged in plaintiff's Original Petition filed on or about September 16, 1974, be dismissed and in support thereof states the following grounds:

1. This defendant incorporates in this paragraph as if fully set out herein this defendant's Motion For Summary Judgment filed in this court on or about May 29, 1975, the affidavit of Frank Davis, Jr. filed therewith, and the Memorandum Brief filed in support of that Motion For Summary Judgment.

2. This defendant incorporates in this paragraph as if fully set out herein its Motion For Summary Judgment

filed on October 18, 1976 and the supporting Memorandum Brief filed therewith.

3. After April 4, 1973, this defendant had no duty to provide car service to plaintiff's plant because on that date this defendant's railroad line to plaintiff's plant became impassable and plaintiff was notified that car service could not be provided.

4. This defendant had no duty to provide car service from April 4, 1973, until the time plaintiff decided to close down its business because during that time period plaintiff placed no legally sufficient orders for cars to be delivered to plaintiff's plant.

5. This defendant had no duty to provide car service to plaintiff's plant at any time after April 4, 1973, because after that date plaintiff placed no legally sufficient orders for cars to be delivered to plaintiff's plant.

6. There is not sufficient evidence to support a finding that this defendant has committed a breach of any applicable common law or statutory duty to provide car service to plaintiff.

7. There is not sufficient evidence to support a finding that this defendant has committed a breach of any applicable common law or statutory duty to provide car service that was a proximate cause of the closing of plaintiff's business or damages claimed therefor.

8. Even if this defendant is guilty of any breach of a duty to plaintiff to provide car service, there is not sufficient evidence to support a finding that any such breach by this defendant was the proximate cause of any damages that are legally recoverable by a shipper for breach by a carrier of a duty to provide car service.

9. There is not sufficient evidence to support a finding that this defendant had timely and effective notice that cessation of rail service to plaintiff's plant would cause

plaintiff to close down its business, and therefore this defendant cannot be liable for the special damages claimed by plaintiff for loss of value of plaintiff's business.

10. This Court has no subject matter jurisdiction in this action and therefore has no power to rule on plaintiff's claim. This defendant's rail service was at all times utilized by plaintiff only for interstate shipments. 49 USCA §§1, 8, 9, 16, and other applicable sections of the Interstate Commerce Act, constitute the applicable law in this case. Claims for damages like the present one that arise under the Interstate Commerce Act can be prosecuted only in a United States District Court, or before the Interstate Commerce Commission. A state court of original jurisdiction does not have subject matter jurisdiction over plaintiff's claim for relief.

11. This Court has no subject matter jurisdiction over plaintiff's claim and therefore has no power to rule on it because a ruling on the merits of this case necessitates the determination of questions that raise issues of transportation policy which ought to be considered by the Interstate Commerce Commission in the interest of effecting the uniform and expert administration of the regulatory scheme laid down by the Interstate Commerce Act. The primary jurisdiction doctrine requires that the questions that raise issues of transportation policy should be determined by the Interstate Commerce Commission and not by a state court of original jurisdiction.

12. There is no sufficient evidence to support a finding that this defendant is guilty of willful and malicious conduct as alleged in plaintiff's claim for exemplary damages.

Wherefore, defendant Chicago and North Western Transportation Company prays that the Court render judgment dismissing the claim alleged in Plaintiff's Original Petition and taxing costs to the plaintiff.

DISMISSAL OF DIVISION II OF PLAINTIFF'S AMENDMENT TO PETITION

The defendant Chicago and North Western Transportation Company respectfully moves that the claim for relief alleged in Division II of Plaintiff's Amendment To Petition be dismissed and in support thereof states the following grounds:

13. There is not sufficient evidence to support a finding that this defendant was guilty of any negligence in the maintenance of the roadbed of its railroad line to plaintiff's plant.

14. There is not sufficient evidence to support a finding that this defendant was guilty of any negligence in maintaining its roadbed that was a proximate cause of the closing of plaintiff's business or the damages claimed therefor.

15. Even if this defendant is guilty of negligence in failing to maintain its roadbed, plaintiff is not entitled to recover damages for the value of its business because such damages for economic loss where there is no physical damage to plaintiff's property and no intent by defendant are, under the facts of this case, too remote to be recoverable and are not a proper element of damage.

16. Under the facts of this case the plaintiff is not a party contemplated by §479.122 of the Iowa Code as one entitled to recover damages under that statute.

17. Plaintiff cannot recover for damage to property under §479.122 because that statute provides a right to recover only for personal injuries sustained.

18. There is no sufficient evidence to support a finding that this defendant is guilty of willful and malicious conduct as alleged in plaintiff's claim for exemplary damages.

19. If this defendant does owe any duty to plaintiff under the facts of this case to maintain its roadbed

with ordinary care, any such duty is dependent upon the existence of a duty owed by this defendant to plaintiff to provide car service, and any duty this defendant may owe to plaintiff to maintain its roadbed with ordinary care cannot extend beyond the limits of the duty this defendant may have to provide car service to plaintiff. In Divisions II and III of Plaintiff's Amendment To Petition, plaintiff alleges as a necessary element of its claims for relief in those Divisions II and III a breach by this defendant of its duty to provide car service under the laws and statutes of the State of Iowa. This defendant therefore states as grounds for dismissal of plaintiff's Division II the following reasons, all of which have previously been set out in paragraphs 1-11 of this Motion as grounds for dismissal of Plaintiff's Original Petition:

a. This defendant incorporates in this paragraph as if fully set out herein this defendant's Motion For Summary Judgment filed in this court on or about May 29, 1975, the affidavit of Frank Davis, Jr. filed therewith, and the Memorandum Brief filed in support of that Motion For Summary Judgment.

b. This defendant incorporates in this paragraph as if fully set out herein its Motion For Summary Judgment filed on October 18, 1976 and the supporting Memorandum Brief filed therewith.

c. After April 4, 1973, this defendant had no duty to provide car service to plaintiff's plant because on that date this defendant's railroad line to plaintiff's plant became impassable and plaintiff was notified that car service could not be provided.

d. This defendant had no duty to provide car service from April 4, 1973, until the time plaintiff decided to close down its business because during that time period plaintiff placed no legally sufficient orders for cars to be delivered to plaintiff's plant.

e. This defendant had no duty to provide car service to plaintiff's plant at any time after April 4, 1973, because after that date plaintiff placed no legally sufficient orders for cars to be delivered to plaintiff's plant.

f. There is not sufficient evidence to support a finding that this defendant has committed a breach of any applicable common law or statutory duty to provide car service to plaintiff.

g. There is not sufficient evidence to support a finding that this defendant has committed a breach of any applicable common law or statutory duty to provide car service that was a proximate cause of the closing of plaintiff's business or damages claimed therefor.

h. Even if this defendant is guilty of any breach of a duty to plaintiff to provide car service, there is not sufficient evidence to support a finding that any such breach by this defendant was the proximate cause of any damages that are legally recoverable by a shipper for breach by a carrier of a duty to provide car service.

i. There is not sufficient evidence to support a finding that this defendant had timely and effective notice that cessation of rail service to plaintiff's plant would cause plaintiff to close down its business, and therefore this defendant cannot be liable for the special damages claimed by plaintiff for loss of value of plaintiff's business.

j. This Court has no subject matter jurisdiction in this action and therefore has no power to rule on plaintiff's claim. This defendant's rail service was at all times utilized by plaintiff only for interstate shipments. 49 USCA §§1, 8, 9, 16, and other applicable sections of the Interstate Commerce Act, constitute the applicable law in this case. Claims for damages like the present one that arise under the Interstate Commerce Act can be prosecuted only in a United States District Court, or before the Interstate Commerce Commission. A state court of

original jurisdiction does not have subject matter jurisdiction over plaintiff's claim for relief.

k. This Court has no subject matter jurisdiction over plaintiff's claim and therefore has no power to rule on it because a ruling on the merits of this case necessitates the determination of questions that raise issues of transportation policy which ought to be considered by the Interstate Commerce Commission in the interest of effecting the uniform and expert administration of the regulatory scheme laid down by the Interstate Commerce Act. The primary jurisdiction doctrine requires that the questions that raise issues of transportation policy should be determined by the Interstate Commerce Commission and not by a state court of original jurisdiction.

Wherefore, defendant Chicago and North Western Transportation Company prays that the Court render judgment dismissing the claim alleged in Division II of Plaintiff's Amendment To Petition and taxing costs to the plaintiff.

DISMISSAL OF DIVISION III OF PLAINTIFF'S AMENDMENT TO PETITION

The defendant Chicago and North Western Transportation Company respectfully moves that the claim for relief alleged in Division III of Plaintiff's Amendment To Petition be dismissed and in support thereof states the following grounds:

20. This defendant repleads paragraph 13 of this Motion To Dismiss as if fully set out herein.

21. There is not sufficient evidence to support a finding that this defendant was guilty of any negligence in maintaining its roadbed that was a proximate cause of the alleged loss by plaintiff of future income from unfulfilled contracts.

22. Even if this defendant is guilty of negligence in failing to maintain its roadbed, plaintiff is not entitled to recover damages for loss of future income from unfulfilled contracts because such damages for economic loss where there is no physical damage to plaintiff's property and no intent by defendant are, under the facts of this case, too remote to be recoverable and are not a proper element of damage.

23. This defendant repleads paragraph 16 of this Motion To Dismiss as if fully set out herein.

24. This defendant repleads paragraph 17 of this Motion To Dismiss as if fully set out herein.

25. This defendant repleads paragraph 18 of this Motion To Dismiss as if fully set out herein.

26. This defendant repleads paragraph 19 of this Motion To Dismiss as if fully set out herein and hereby states as grounds for dismissal of Division III of Plaintiff's Amendment To Petition the reasons set forth in paragraph 18, including subparagraphs 19(a)-19(k).

27. If plaintiff is granted recovery under Division II of Plaintiff's Amendment To Petition, plaintiff cannot recover under Division III because alleged loss of future income from unfulfilled contracts claimed in Division III is an element included in the value of plaintiff's business claimed as damages in Division II. Allowing recovery for damages claimed in both Division II and III would amount to allowing plaintiff a double recovery.

Wherefore, defendant Chicago and North Western Transportation Company prays that the Court render judgment dismissing the claim alleged in Division III

of Plaintiff's Amendment To Petition and taxing costs to the plaintiff.

GAMBLE, RIEPE, BURT, WEBSTER,
& FLETCHER
By /s/ J D Polson
James D. Polson
By /s/ Bruce E. Johnson
Bruce E. Johnson
2600 Ruan Center
Des Moines, Iowa 50309
(515) 243-6251
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa
on the 18th day of Oct. 1976

/s/ B. Johnson